

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

MORGAN McCAFFREY,)
)
Plaintiff,)
)
v.)
)
CITY OF WILMINGTON,)
WILMINGTON POLICE)
DEPARTMENT, et al.)
Defendants.)

C.A. No. N12C-01-138 PLA

ON DEFENDANTS CITY OF WILMINGTON AND CITY OF WILMINGTON
POLICE DEPARTMENT’S PARTIAL MOTION TO DISMISS
GRANTED

Submitted: March 2, 2012

Decided: April 25, 2012

This 25th day of April, 2012, it appears to the Court that:

1. Defendants City of Wilmington (“City”) and the Wilmington Police Department (“WPD”) have filed partial motions to dismiss pursuant to Superior Court Civil Rule 12(b)(6). Because the WPD is not an independent entity subject to suit, its motion to dismiss is GRANTED in its entirety. Similarly, because Plaintiff’s civil rights claims alleged against the City in Count II of the Complaint are based on a theory of respondeat superior, which is not recognized under 42 United States Code section 1983, the City’s motion to dismiss Count II of the Complaint is GRANTED. Finally, the City’s motion to dismiss Count I of the Complaint is GRANTED because the Court concludes that the police officer’s

alleged actions giving rise to the complaint were outside of the scope of his employment with the City.

2. This is a personal injury lawsuit arising from a traffic accident that occurred late in the evening on June 5, 2010. The Complaint alleges that Defendant Michael Spencer (“Spencer”), a patrolman in the WPD, ran a red light and hit McCaffrey’s car, injuring her. Immediately following the accident, Spencer identified himself as an off-duty police officer. He called the police to report the accident at the scene. According to the Complaint, Spencer admitted that he had been drinking alcohol before driving that night. Spencer and McCaffrey waited for the police at the scene of the accident for about fifteen minutes. During that time, Spencer placed his hands on McCaffrey’s back and kissed her on the lips. Spencer then called the police to cancel his earlier call and suggested to McCaffrey that they drive to her nearby apartment to clear the road. The Complaint does not allege that Spencer was driving a police car or wearing a police uniform, nor does the Complaint allege that Spencer attempted to make an arrest or issue a citation at the scene of the accident.

At McCaffrey’s residence, Spencer removed several items from the glove compartment of his car, including his gun, magazine, and badge, and asked McCaffrey to hold them for him. He then asked to go into McCaffrey’s apartment. McCaffrey, who says she felt pressured by the fact that Spencer was a police

officer, allowed Spencer into her apartment. Once inside the apartment, Spencer undressed, got into McCaffrey's bed, and asked her if she wanted to have sex. When McCaffrey refused Spencer's initial advance, Spencer straddled her on the bed and asked her again if she wanted to have sex. She again refused. Spencer fell asleep in McCaffrey's bed about five minutes later.

McCaffrey went to a neighbor's apartment and called the WPD. Corporal Schifano, Sergeant Bluestein, and Sergeant Murray, all of the WPD, arrived at the neighbor's apartment shortly thereafter.¹ McCaffrey gave the officers Spencer's gun and other items and told them what had happened. The officers remarked that Spencer was so "out of it" that he probably did not even know where he was and assured McCaffrey that he was "harmless" and "drunk." The officers woke Spencer, who was still asleep in McCaffrey's bed, and took him to the police station, where he initially refused to take a sobriety test or to make a statement about the traffic accident. Spencer later agreed to take a field sobriety test, which he passed. It is not known how much time passed before the field test was administered. No criminal charges were brought against Spencer, but he was disciplined after an internal investigation and hearing.

3. McCaffrey filed this Complaint on January 19, 2012, alleging, *inter alia*, negligence and recklessness and civil rights violations against Spencer and

¹ Schifano, Bluestein, and Murray have all been named as defendants individually and in their capacity as officers of the WPD in connection with the incident.

the City. McCaffrey also alleged negligent hiring and supervision against the City and sought to recover for assault and battery against Spencer and for intentional infliction of emotional distress against all of the individual police officers involved in the incident. On March 2, 2012, the City filed a motion to dismiss Counts I and II of the Complaint, which seek to impute Spencer's alleged negligent and reckless driving and his alleged civil rights violations to the City.² Specifically, Count I alleges that Spencer was negligent and reckless when he:

- (a) Failed to stop at a red traffic signal in violation of 21 *Del. C.* §4108;
- (b) Drove under the influence of alcohol and/or drugs in violation of 21 *Del. C.* §4177(a);
- (c) Drove in a careless or inattentive manner in violation of 21 *Del. C.* §4176;
- (d) Failed to keep a proper lookout;
- (e) Failed to maintain control over his vehicle;
- (f) Had the last clear chance to avoid a collision.³

Notably, Count I only addresses the traffic accident and does not address the alleged unwanted sexual contact between Spencer and McCaffrey. Count IV of the Complaint, which alleges negligent and reckless hiring, retention, and supervision against the City and the WPD, addresses Spencer's alleged sexual misconduct. Count IV is not subject to this motion to dismiss. The City contends that nothing in the Complaint meets any of the criteria set forth by Delaware courts as

² Because the Plaintiff has conceded that WPD is not subject to suit and that her civil rights claims against the City and the WPD cannot be sustained, the Court will only address the City's arguments in favor of dismissing Count I of the Complaint against the City.

³ Complaint at ¶39.

necessary to show that Spencer was acting in the course and scope of his employment as a Wilmington police officer at the time of the events alleged in the Complaint. Indeed, the City asserts, the facts alleged in the Complaint directly contradict her allegation that Spencer was acting in the course and scope of his work duties. The City points out that McCaffrey admitted that Spencer was off duty at the time of the events giving rise to the Complaint. Moreover, the City argues, the acts alleged in the Complaint are self-evidently not of the kind Spencer is employed to perform and not intended in any way to serve the interests of the City of Wilmington. Furthermore, the City argues that to the extent that force is alleged, it is clearly not of a type expected by Spencer's employer. As such, the City contends that Count I of the Complaint must be dismissed as a matter of law.

4. In response, McCaffrey contends that she does not know for a fact that Spencer was off duty at the time of the alleged incident and that she should be permitted to take discovery on this point. Furthermore, McCaffrey argues that Spencer was acting in the scope of employment when he identified himself as an officer of the WPD and asserted his authority as a police officer by reporting the accident and then canceling the call, showing her his police badge and gun, and instructing her to move her vehicle from the road. McCaffrey submits that she only followed Spencer's instructions because he was a police officer. McCaffrey points out that the Restatement of Agency permits holding a master liable for the

torts of a servant committed outside the scope of employment where “the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.”⁴ McCaffrey implicitly suggests that Spencer either relied on the apparent authority of the WPD by identifying himself as a police officer or that he was aided in accomplishing the tort by virtue of the fact that he was a police officer. McCaffrey cites a journal article surveying civil liability for the acts of off-duty articles and notes that courts have considered such factors as “departmental policy, whether or not [the officer] assert[s] their police authority in the course of [...] conduct, such as by displaying a badge or gun, announcing [himself] as police, or carrying out functions that traditionally have been reserved for law enforcement.”⁵ Here, McCaffrey argues, Spencer identified himself as a police officer, displayed his badge and gun, and carried out a function traditionally reserved for law enforcement by reporting the accident to the police and instructing her to clear her vehicle from the road. McCaffrey further refers the Court to a Ninth Circuit decision finding that an off-duty jail commander acted under color of law where he asserted that he was a “cop” to prevent bystanders from interfering

⁴ Restatement (Second) of Agency §219 (1958).

⁵ Pl’s Opp. to Def. City of Wilmington’s Partial Mot. to Dismiss at ¶11, citing *Civil Liability for Acts of Off-Duty Officers*, 2007 (9) AELE Mo. L. J. 101, 102 (Sept. 2007) (internal quotation marks omitted).

with his assault on a motorist who rear-ended him.⁶ By way of contrast, McCaffrey also cites a decision of the District of Columbia Court of Appeals finding that a municipality cannot be held liable under a theory of *respondereat superior* for the off-duty actions of a police officer who acted purely out of personal motivations.⁷

5. Upon a motion to dismiss, the Court's role is to determine "whether [the] plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."⁸ If recovery is possible, the Court must deny the motion to dismiss.⁹ When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.¹⁰ In addition, every reasonable factual inference will be drawn in favor of the plaintiff.¹¹

6. McCaffrey's claims against the City fail as a matter of law for several reasons. First, Spencer's alleged conduct does not fall within the scope of employment. In Delaware, responsibility for an employee's tortious conduct, committed in the scope of employment, will be imputed to the employer by the

⁶ See *Anderson v. Warner*, 451 F.3d 1063 (9th Cir. 2006).

⁷ *Phelan v. City of Mount Rainier*, 805 A.2d 930 (D.C. Ct. App. 2002).

⁸ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

⁹ *Id.*

¹⁰ *Id.*; *Wyoming Concrete Indus. Inc., v. Hickory Commons, LLC II*, 2007 WL 53805, at *1 (Del. Super. Jan. 8, 2007).

¹¹ *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

doctrine of *respondeat superior*.¹² Liability for the torts of the servant will only be imposed upon the master when those torts are committed by the servant within the scope of employment which, at least in theory, means that they were committed in furtherance of the master's business.¹³ To determine whether an employee's conduct is within the scope of employment, the Court examines whether

- (1) it is of the kind he is employed to perform;
- (2) it occurs within authorized time and space limits;
- (3) it is activated, in part at least, by a purpose to serve the master; and
- (4) if force is used, the use of force is not unexpected by the master.¹⁴

Ordinarily whether an alleged tortfeasor was acting in the course and scope of his employment is a question of fact for the jury; however, the court may decide the issue as a matter of law where the facts clearly indicate that the tort was not committed in the scope of employment.¹⁵

7. Because Count I of the Complaint only addresses Spencer's alleged negligence and recklessness in causing the traffic accident, the Court will limit its analysis to these allegations. Applying the above four factors to the allegations in this case, it is obvious that Spencer's alleged conduct on the night of June 5, 2010 was outside of the scope of his employment as a police officer. Spencer is not authorized by the City in his capacity as a police officer to drive under the

¹² *Fisher v. Townsends*, 695 A.2d 53, 58 (Del. 1998) (citing *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427, 432 (Del. 1965)).

¹³ *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 570 (Del. 1967).

¹⁴ *Id.* at 570 (citing Restatement (Second) of Agency §228 (1958)).

¹⁵ *Id.* at 569.

influence of alcohol. His driving while intoxicated and subsequently causing a motor vehicle accident could not have been activated by a purpose to serve the city. Additionally, the Complaint alleges that Spencer was off-duty at the time of the incident. Although McCaffrey has asked to be permitted to engage in discovery to verify Spencer's status at the time of the accident, his alleged conduct was so far outside the bounds of what would normally be expected of a police officer that it would fall outside the scope and course of employment regardless of whether he was actually on duty or off duty that night. Finally, to the extent force was used (which was not alleged in connection with the accident), the City would not have reasonably anticipated the use of force in connection with Spencer's employment.

8. McCaffrey's alternative theory of liability based on Spencer's apparent authority is unavailing. Count I of the Complaint only alleges that Spencer was negligent and reckless insofar as it caused the accident that injured McCaffrey and does not attempt to impute responsibility for Spencer's conduct following the accident to the City. Spencer's acts of negligence and recklessness, as alleged in Count I of the Complaint, therefore all occurred before Spencer and McCaffrey interacted. There has been no allegation that Spencer was driving a marked or unmarked Wilmington police vehicle, that he was wearing a police uniform, or that he was on duty at the time of the accident. As such, there was no

opportunity, with regard to the allegations raised in Count I of the Complaint, either for Spencer to assert the authority of the police department or for McCaffrey to act in reasonable reliance on Spencer's apparent or asserted authority as a police officer. Because the Court finds that there is no legal basis for McCaffrey to recover from the City based on the allegations of negligence and recklessness raised in Count I of the Complaint, the City's motion to dismiss Count I of the Complaint is GRANTED.

9. For all of the reasons set forth above, Defendants' partial motions to dismiss are GRANTED.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

Peggy L. Ableman, Judge

Original to Prothonotary

cc: All counsel via File & Serve